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Toni Cannady

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# CLASSIFYING WCAG 2.0 GUIDELINES AS THE LEGAL STANDARD FOR WEBSITES UNDER TITLE III OF THE AMERICANS WITH DISABILITIES ACT

*Toni Cannady*<sup>+</sup>

The Americans with Disabilities Act (ADA)<sup>1</sup> is a longstanding nondiscrimination mandate intended to protect the rights of individuals with disabilities.<sup>2</sup> Signed into law in 1990, the ADA is considered the first advancement toward dissolving the barriers to equal opportunities for members of the disabled community.<sup>3</sup> Title III of the ADA governs public accommodations (*e.g.*, private businesses) and prescribes accessibility standards that covered entities must meet to comply with the law.<sup>4</sup> The statute and regulations, however, have failed to keep pace with technological advances and the growing needs of businesses and the disabled community alike.<sup>5</sup>

The ADA was enacted “on the eve of an information revolution that Congress did not foresee,” when the Internet, as society knows it today, did not exist.<sup>6</sup> At

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<sup>+</sup> J.D. Candidate, December 2018, The Catholic University of America, Columbus School of Law; B.A. 2012, Spelman College. The Author would like to thank her mentor, Nessa Feddis, for her invaluable guidance and expertise throughout the writing and editing process of this Note. The Author would also like to thank her parents, family, and friends for their continuous love, support, and encouragement. Finally, the Author would like to thank the Catholic University Law Review for its hard work and assistance in editing and publishing this Note.

1. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101–12213 (2012).

2. *Id.* § 12101(b).

3. Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 3 (2004) (explaining that the statute “represented our society’s first comprehensive acknowledgment that people with disabilities are truly equal citizens”). *See also* George H.W. Bush, President of the United States, Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990) (transcript available at [https://www.eeoc.gov/eeoc/history/35th/videos/ada\\_signing\\_text.html](https://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html)) (explaining that the signing of the ADA “is the world’s first comprehensive declaration of equality for people with disabilities”).

4. 42 U.S.C. § 12182; *see also* 28 C.F.R. § 36 (2016).

5. Katherine Rengel, *The Americans with Disabilities Act and Internet Accessibility for the Blind*, 25 J. MARSHALL J. COMPUTER & INFO. L. 543, 582 (2008) (“In order to keep pace with the rapidly changing technology, Congress must update the ADA by creating an amendment that specifically applies to the Internet.”).

6. Ali Abrar & Kerry J. Dingle, *From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 HARV. C.R.-C.L. L. REV. 133, 140 (2009). *See also* Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov’t Entities and Pub. Accommodations, 75 Fed. Reg. 43,460, 43,461 (July 26, 2010); Elon Univ. Sch. of Commc’ns, *Imagining the Internet’s Quick Look at the Early History of the Internet*, <http://www.elon.edu/e-web/predictions/early90s/internethistory.xhtml> (last visited Mar. 19, 2018) (suggesting that the internet did not “actually appear online and come into use by other people until 1991”).

that time, customers traveled to grocery stores (*i.e.*, brick and mortar locations), walked aisle to aisle to find their desired items, and checked out at traditional check-out counters. Today, with the evolution of the internet, customers can use online delivery services such as Peapod to grocery shop in their homes with a few clicks of a mouse.<sup>7</sup> This is just one example of the myriad of developments in technology that has led businesses to rely on digital platforms more heavily, much to the benefit of their customers.<sup>8</sup>

This evolution of the internet age has introduced a new generation of questions regarding the accessibility of websites. In the absence of regulations and clearly defined website accessibility standards, individuals with disabilities, particularly those who are blind, are unable to enjoy the technological advances “in the manner in which [they are] intended.”<sup>9</sup> These questions have sparked a national debate, led to a wave of demand letters and lawsuits concerning the legal obligations of companies, and exposed serious defects in the ADA that stem from Congress’s deliberate statutory ambiguity.<sup>10</sup> Nearly 27 years since its passage, neither the ADA nor its implementing regulation make reference to the accessibility of websites.<sup>11</sup> Ideally, Congress should address this in legislation; however, that is a tall order and one that is unlikely to materialize in the foreseeable future.<sup>12</sup> Therefore, the relationship between the ADA and websites continues to be a transient area of the law.

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7. See *e.g.*, Peapod, [https://www.peapod.com/?999=Home&002=33&006=10788&c3apid=22077557892&gclid=COHy4-K\\_99kCFc3AswodVEQKvg&gclid=ds&msclkid=b56d2c3a0beb153f0bde76953e4e1d11](https://www.peapod.com/?999=Home&002=33&006=10788&c3apid=22077557892&gclid=COHy4-K_99kCFc3AswodVEQKvg&gclid=ds&msclkid=b56d2c3a0beb153f0bde76953e4e1d11) (last visited Mar. 19, 2018).

8. Ryan Campbell Richards, *Reconciling the Americans with Disabilities Act and Commercial Websites: A Feasible Solution?*, 7 RUTGERS J.L. & PUB. POL’Y 520, 520 (2010) (noting that the internet “facilitates a variety of functions, which include communication via electronic mail, social and business networking, the dissemination of information, popular gaming, streaming films and television programs, scholarly research, file storage, and commercial transactions”); see also Abrar & Dingle, *supra* note 6, at 133 (acknowledging that “[f]or the individual, new means of communication, entertainment, and commerce have transformed daily life.”).

9. Richards, *supra* note 8, at 521.

10. See Minh N. Vu & Julia N. Sarnoff, *Public Accommodations are Starting to Win Website Accessibility Lawsuits*, ADA TITLE III BLOG (Mar. 24, 2017), <https://www.adatitleiii.com/2017/03/public-accommodations-are-starting-to-win-website-accessibility-lawsuits/> (suggesting that “thousands of demand letters” have been sent to businesses); Minh N. Vu, *Federal Website Lawsuits Spike; Community Banks Get Demand Letters*, ADA TITLE III BLOG (Oct. 31, 2016), <https://www.adatitleiii.com/2016/10/federal-website-lawsuits-spike-community-banks-get-demand-letters/> (“The number of lawsuits filed in federal court since the beginning of 2015 has surged to at least 244 as of October 20, 2016.”).

11. See generally 42 U.S.C. § 12101–12213 (2012); 26 C.F.R. §§ 36.101–36.311 (2017).

12. See Letter from Members of Congress to Jeff Sessions, Attorney General of the United States (June 20, 2018) (on file with author). Indeed, Congress has not amended the ADA; rather, 103 members of Congress sent a letter to Attorney General Sessions urging that the DOJ “state publicly that private legal action under the ADA with respect to websites is unfair and violates basic

For years, companies have waited in anticipation for clear rules governing websites.<sup>13</sup> But to many's disappointment, "Congress has not expanded the ADA to include Internet websites and the DOJ has not promulgated [accessibility] regulations to govern Internet websites."<sup>14</sup> Rather, in late December 2017, the DOJ formally withdrew its previously issued Advance Notices of Proposed Rulemaking regarding web access, which further calls into question the likelihood of any forthcoming rulemaking.<sup>15</sup> Moreover, over the past seven years, rather than adopting regulations, the DOJ has advanced differing opinions on the ADA's applicability to websites in litigation.<sup>16</sup> In settlement agreements and consent decrees, the DOJ has required covered entities to comply with a voluntary standard developed by a non-governmental agency.<sup>17</sup> However, the DOJ's overzealous enforcement activities and litigation posture combined with the lack of regulations addressing website accessibility has encouraged opportunistic plaintiffs' lawyers to pursue website accessibility claims, leaving courts in a troubling predicament: they must take on the role of rule-writer, filling in the gaps where the ADA is silent or ambiguous, as well as determining the legal requirements of companies' websites.<sup>18</sup> The threshold question, therefore, is whether the ADA covers websites. While some circuit

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due process principles in the absence of clear statutory authority and issuance by the Department of a final rule establishing website accessibility standards." *Id.*

13. See Advance Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov't. Entities and Pub. Accommodations, 75 Fed. Reg. 43,460; see also Supplemental Advance Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov't. Entities and Pub. Accommodations, 81 Fed. Reg. 49,908 (May 9, 2016); Office of Info. and Regulatory Affairs (OIRA), *Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions*, (last visited Mar. 19, 2018), <https://www.reginfo.gov/public/do/eAgendaMain>.

14. Reply Brief for Appellant Winn-Dixie Stores, Inc. at 15, *Winn-Dixie Stores, Inc. v. Gil*, 257 F.Supp.3d 1340 (2017) (No. 17-13467).

15. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (December 26, 2018).

16. Statement of Interest of the United States of America, *Nat'l Ass'n of the Deaf v. Harvard Univ.*, No. 3:15-CV-30023-MGM (D. Mass. June 25, 2015), [https://www.ada.gov/briefs/harvard\\_soi.pdf](https://www.ada.gov/briefs/harvard_soi.pdf); Statement of Interest of the United States of America, *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, No. 3:15-CV-30024-MGM (D. Mass. June 25, 2015), [https://www.ada.gov/briefs/mit\\_soi.pdf](https://www.ada.gov/briefs/mit_soi.pdf).

17. See, e.g., Settlement Agreement Between the United States of America and edX Inc., DJ No. 202-36-255 (Apr. 2, 2015), [https://www.ada.gov/edx\\_sa.htm](https://www.ada.gov/edx_sa.htm); Settlement Agreement Between the United States of America and Ahold U.S.A., Inc. and Peapod, LLC, DJ No. 202-63-169 (Nov. 17, 2014), [https://www.ada.gov/peapod\\_sa.htm](https://www.ada.gov/peapod_sa.htm); Settlement Agreement Between the United States of America and the National Museum of Crime and Punishment (Jan. 13, 2015), [https://www.ada.gov/crime\\_punishment\\_museum/crime\\_punishment\\_sa.htm](https://www.ada.gov/crime_punishment_museum/crime_punishment_sa.htm).

18. Bryan Cave Leighton Paisner, LLP, *DOJ Puts Website Accessibility Regulations on Inactive List*, JD SUPRA (July 25, 2017), <https://www.jdsupra.com/legalnews/doj-puts-website-accessibility-91126/>.

courts continue to debate whether a website is a public accommodation,<sup>19</sup> this debate is not central to the premise of this Note. Courts have advanced inconsistent opinions regarding the applicability of the ADA to websites.<sup>20</sup> Nevertheless, this Note takes the position that case law and the absence of regulations suggest that the ADA, as currently written, does not apply to websites.

This challenging juxtaposition has forced covered entities to rely on a patchwork of *ad hoc* decisions, primarily by district courts, which are “slowly creating a body of [inconsistent] jurisprudence around this issue” for guidance in determining Title III obligations.<sup>21</sup> While there are hundreds of lawsuits highlighting the controversy, the United States District Court for the Central District of California’s decision in *Robles v. Domino’s Pizza LLC*<sup>22</sup> is the first comprehensive ruling to acknowledge the need for statutory and regulatory amendments before imposing specific accessibility standards on businesses. In *Domino’s*, a case currently on appeal, the court dismissed an ADA website accessibility claim that alleged that Domino’s violated the ADA by failing to comply with the Web Content Accessibility Guidelines 2.0 (WCAG).<sup>23</sup> In dismissing the case, the district court addressed two significant issues.<sup>24</sup> First, the court explicitly found that requiring businesses to comply with WCAG violates due process principles in the absence of “meaningful guidance” by the DOJ.<sup>25</sup> Second, the court implicitly addressed whether deference should be afforded to the DOJ, specifically when determining the minimum requirements

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19. *Compare* Morgan v. Joint Admin. Bd., 268 F.3d 456, 459 (7th Cir. 2001) (citing the 7th Circuit’s interpretation that a nexus between a physical location and a company’s website is not a prerequisite to determining whether the company is a public accommodation), *with* Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006) (providing that the 9th Circuit’s interpretation differs from the 7th Circuit’s interpretation because the 9th Circuit reads the definition of public accommodation to require a nexus between a store’s physical location and website).

20. Richards, *supra* note 8, at 522 (“A website may qualify as a public accommodation, a service thereof, or neither; the courts have yet to arrive at a mutually acceptable definition.”).

21. Kristina M. Launey & Melissa Aristizabal, *Website Accessibility Lawsuit Filings Still Going Strong*, ADA TITLE III BLOG (Aug. 22, 2017), <https://www.adatitleiii.com/2017/08/website-accessibility-lawsuit-filings-still-going-strong/>. *See, e.g.*, Gorecki v. Hobby Lobby Stores, Inc., No. CV 17-1131-JFW(SKX), 2017 WL 2957736 (C.D. Cal. June 15, 2017) (finding that a website is a public accommodation and holding inapposite of the *Domino’s* decision founded on due process principles); Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340 (S.D. Fla. 2017) (providing that the company’s website is a service of a public accommodation and requiring the business to implement WCAG guidelines); Robles v. Domino’s Pizza LLC, No. CV1606599SJOSPX, 2017 WL 1330216, at \*6 (C.D. Cal. Mar. 20, 2017) (holding that a website provides services of a place of public accommodation, requiring covered entities to comply with specific guidelines violates principles of fairness and due process, and providing that WCAG does not have the force of law).

22. No. CV1606599SJOSPX, 2017 WL 1330216, at \*5 (C.D. Cal. Mar. 20, 2017).

23. *Id.* at \*1.

24. *Id.* at \*5–6.

25. *Id.* at \*5.

companies must meet when developing and maintaining accessible websites.<sup>26</sup> Importantly, Judge Otero noted that neither the statute nor the regulations address website accessibility and made a plea to Congress and the DOJ to set minimum standards for website accessibility.<sup>27</sup>

This Note provides an interpretation of the court's decision in *Domino's* and argues that WCAG does not have the force of law. Part I of this Note provides an overview on the evolution of the ADA and the DOJ's changing position. As this Note explains, the plain language of the statute does not indicate an obligation to provide accessible websites and the DOJ's litigation posture should not be afforded deference. Part II of this Note provides a summary of the main case, *Domino's*. Part III then argues that the United States District Court for the Central District of California's decision in *Domino's* is correct and suggests the need for statutory and regulatory reforms.

## I. AN OVERVIEW OF THE HISTORICAL PROGRESSION OF THE ADA AND THE DOJ'S CHANGING POSITION

### A. *The Americans with Disabilities Act of 1990*

The ADA is premised on the ideals incorporated in the Rehabilitation Act of 1973—that disabled individuals deserve equal opportunities.<sup>28</sup> Accordingly, Congress enacted the ADA to eliminate the longstanding societal history of isolating and segregating individuals with disabilities<sup>29</sup> and establish a clear and comprehensive nondiscrimination mandate to bridge a gap that “separated

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26. *Id.* at \*6 (“The DOJ’s interpretation in a notice of proposed rulemaking is similarly unpersuasive. Given the Ninth Circuit’s decision not to give deference to these categories of concrete, public statements made in the ADA context, the Court concludes that little or no deference is owed to statements made by the DOJ through documents filed in the course of litigation with regulated entities.”) (internal citation omitted).

27. *Id.* at \*8.

28. H.R. REP. NO. 101-485, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 381–82. Section 504 of the Rehabilitation Act of 1973 prohibits Federal agencies and recipients of Federal financial assistance from discriminating against persons with disabilities. The purpose of title III of the legislation is to extend these general prohibitions against discrimination to privately operated public accommodations and to bring individuals with disabilities into the economic and social mainstream of American life.

*Id.*; see Leah Poynter, *Setting the Standard: Section 508 Could Have an Impact on Private Sector Web Sites Through the Americans with Disabilities Act*, 19 GA. ST. U. L. REV. 1197, 1197 (2003); see also Stephanie Khouri, *Disability Law—Welcome to the New Town Square of Today’s Global Village: Website Accessibility for Individuals with Disabilities After Target and the 2008 Amendments to the Americans with Disabilities Act*, 32 U. ARK. LITTLE ROCK L. REV. 331, 335 (2010) (discussing that “[o]ne important fact to remember is that the ADA was meant to be interpreted in conjunction with the Rehabilitation Act of 1973”).

29. 42 U.S.C. § 12101(a)(2); see also Robert L. Burgdorf Jr., *Why I Wrote the Americans with Disabilities Act*, THE WASH. POST (July 24, 2015), [https://www.washingtonpost.com/postever/rything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?utm\\_term=.abeaed2e3396](https://www.washingtonpost.com/postever/rything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?utm_term=.abeaed2e3396).

Americans with disabilities from the freedom they could glimpse, but not grasp.”<sup>30</sup> Divided into five titles, the statute serves to ensure individuals with disabilities are “fully integrated into the fabric of society.”<sup>31</sup> In particular, Title III governs private entities and provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any [private entity] who owns, leases (or leases to), or operates a place of public accommodation.”<sup>32</sup>

Inherent in this prohibition against discrimination, covered entities have four obligations to ensure disabled individuals have equal access to goods and services.<sup>33</sup> First, covered entities must provide facilities that are accessible to persons with disabilities.<sup>34</sup> Second, businesses are required to make “reasonable modifications in policies, practices, or procedures . . . unless the entity can

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30. 42 U.S.C. § 12101(b)(1); Lex Frieden, the University of Texas Health Science Center at Houston, *The Impact of the ADA in American Communities* (July 23, 2015), [http://southwestada.org/html/publications/general/20150715%20ADA%20Impact%20Narrative%20\(Rv-Final%20v2\).pdf](http://southwestada.org/html/publications/general/20150715%20ADA%20Impact%20Narrative%20(Rv-Final%20v2).pdf).

31. *Equip for Equality*, <https://www.equipforequality.org/ada-il/> (last visited Mar. 19, 2018) (informing readers that Title I of the ADA governs employers; Title II governs state and local governments; Title III governs public accommodations; Title IV telecommunications; and Title V addresses miscellaneous items).

32. 42 U.S.C. § 12182(a); *see also id.* § 12181(7). This latter section defines the following private entities as public accommodations that affect commerce:

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

*Id.* § 12181(7).

33. § 12182(b)(1)(B)–(E).

34. § 12182(b)(2)(A)(i).

demonstrate that such modifications would fundamentally alter the nature of [the] goods, services, facilities, privileges, advantages, or accommodations.”<sup>35</sup> Third, public accommodations must provide “auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”<sup>36</sup> Fourth, companies must “remove architectural barriers, and communication barriers that are structural in nature, in existing facilities.”<sup>37</sup> The ADA has historically focused on physical locations.<sup>38</sup> Accordingly, the statute does not specifically address websites,<sup>39</sup> but instead heavily emphasizes the need for access to physical locations.<sup>40</sup>

### B. Title III Regulations

The ADA charges the DOJ, specifically the Attorney General, with the task of establishing regulations and accessibility standards consistent with the statute enacted by Congress.<sup>41</sup> Pursuant to this mandate, the DOJ issues ADA accessibility regulations for public accommodations<sup>42</sup> and requires covered entities to furnish auxiliary aids and services, where necessary and at no additional charge, to ensure effective communication with disabled individuals.<sup>43</sup> As early as 1996, the DOJ began to suggest that websites should

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35. § 12182(b)(2)(A)(ii).

36. § 12182(b)(2)(A)(iii).

37. § 12182(b)(2)(A)(iv).

38. *See* §§ 12181–12189; Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov’t. Entities and Pub. Accommodations, 75 Fed. Reg. 43,460, 43,461 (July 26, 2010).

39. *See generally* §§ 12111–12117 (dealing with employment); §§ 12131–12165 (dealing with public services); §§ 12181–12189 (dealing with public accommodations and services operated by public entities).

40. *See* §§ 12181–12189.

Section 306(b) of the legislation specifies that not later than one year after the date of enactment of this Act, the Attorney General shall issue regulations in an accessible format to carry out the remaining provisions of this title not referred to in subsection (a) that include standards applicable to facilities and vehicles covered under section 302.

H.R. REP. NO. 101–485, at 124–25 (1990), *reprinted in* 1990 U.S.C.A.N. 303, 407–08.

41. § 12186(b); *see also* 28 C.F.R. § 36.101 (2017) (“The purpose of this part is to implement subtitle A of title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181–12189), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act).”).

42. 28 C.F.R. § 36.101; *see also* Nondiscrimination on the Basis of Disability by Pub. Accommodations and in Com. Facilities, 56 Fed. Reg. 35,544 (July 26, 1991) (“implement[ing] subtitle A of title III of the Americans with Disabilities Act”).

43. 28 C.F.R. § 36.303(a), (c) (2016). Some examples of auxiliary aids and services, provided in the regulation include “[q]ualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; [and] assistive listening systems.” *Id.* § 36.303(b).



be accessible.<sup>44</sup> In response to an inquiry from Senator Tom Harkin, Assistant Attorney General Deval Patrick emphasized that the ADA's mandate requires companies to provide auxiliary aids and services to effectively communicate "regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet."<sup>45</sup> This viewpoint raises a debatable—and thus far, overlooked—principle that a website is an auxiliary aid or service.

On September 15, 2010, the DOJ amended the definition of auxiliary aids and services to include "accessible electronic and information technology."<sup>46</sup> To date, however, the regulations do not provide a clear definition of what constitutes electronic information technology and do not explicitly mention websites.<sup>47</sup> Nevertheless, the DOJ's informal statements maintain that covered entities must provide accessible websites as part of the duty to provide auxiliary aids and services to ensure effective communication, without providing any legal basis, from statute or regulations, for its conclusions.<sup>48</sup> Thus, the critical questions are: (1) whether the ADA's requirement that covered entities provide auxiliary aids and services encompasses websites; (2) whether the statute and regulations, as written, apply to websites; and (3) if so, how do companies comply with the law.

*C. A Primer on the DOJ's Developing Position on the Application of Websites to the ADA and Website Accessibility Regulations*

*1. The DOJ's Policy in 1997 Concerning Regulation of Websites: Self-Regulation unless Agency Action is Necessary*

In the 1990s, the Clinton Administration encouraged self-regulation of e-commerce, including websites, to permit "electronic commerce to flourish," and directed the Heads of Executive Departments and Agencies to "refrain from imposing new and unnecessary regulations" unless government involvement was necessary.<sup>49</sup> In essence, this self-regulation mechanism discouraged rulemaking procedures. The directive did, however, require the DOJ to write regulations where self-regulation proved inadequate.<sup>50</sup> Apparently, the DOJ—

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44. See Letter from Deval L. Patrick, Assistant Att'y Gen., Civ. Rights Div., Dep't of Justice, to Tom Harkin, U.S. Sen. (Sept. 9, 1996), <http://www.justice.gov/crt/foia/tal712.txt>.

45. *Id.* at 1.

46. 28 C.F.R. § 36.303(b) (2010).

47. See 28 C.F.R. §§ 36.101–36.311 (2017).

48. Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov't Entities and Pub. Accommodations, 75 Fed. Reg. 43,460, 43,463 (July 26, 2010). The DOJ acknowledges that "[t]he Internet as it is known today did not exist when Congress enacted the ADA and, therefore, neither the ADA nor the regulations the Department promulgated under the ADA specifically address access to Web sites." *Id.*

49. Memorandum on Elec. Com., 33 WCPD 1006, 1008 (July 1, 1997), <http://www.gpo.gov/fdsys/pkg/WCPD-1997-07-07/html/WCPD-1997-07-07-Pg1006-2.htm>.

50. *Id.*

concluding that government involvement was unnecessary—made a conscious decision not to promulgate, or even propose, regulations concerning website accessibility at that time.

## 2. *The DOJ's Policy from 2010–2017: The Need for Government Action*

### a. *2010 Advance Notice of Proposed Rulemaking*

Almost eight years ago, on July 26, 2010, the DOJ initiated its first step toward a website accessibility rulemaking<sup>51</sup> and “reiterated that Title III of the ADA applied to website accessibility even though the ADA did not specifically mention the Internet.”<sup>52</sup> The agency issued an Advance Notice of Proposed Rulemaking (2010 ANPRM) to notify the public that it was “considering revising the regulations implementing [T]itle III of the . . . ADA . . . to establish requirements for making . . . goods [and] services . . . by public accommodations via the internet . . . accessible to individuals with disabilities” and to solicit comments on various issues, such as appropriate accessibility standards, coverage limitations, compliance issues, reasonable compliance dates, small entities, and cost and benefits of the regulations.<sup>53</sup> Among the appropriate accessibility standards, the DOJ discussed: (1) WCAG 2.0; (2) the Electronic and Information Technology Accessibility Standards (more commonly known as the Section 508 standards); and (3) general performance-based standards.<sup>54</sup>

As the legal foundation for web accessibility regulation, the DOJ asserted that “[w]eb sites . . . operate as places of public accommodation under [T]itle III of the ADA.”<sup>55</sup> In addition, the 2010 ANPRM recognized an alternative to an accessible website (*e.g.*, 24 hours, 7 days a week phone service).<sup>56</sup> The publication of the 2010 ANPRM evidences the DOJ’s understanding, at the time, that website accessibility regulations were needed.<sup>57</sup> Moreover, the DOJ

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51. Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov’t Entities and Pub. Accommodations, 75 Fed. Reg. at 43,460.

52. Deeva V. Shah, *Web Accessibility for Impaired Users: Applying Physical Solutions to Digital Problems*, 38 HASTINGS COMM. & ENT L.J. 215, 236 (2016) (“Specifically, the DOJ stated that the rationale for the ANPRM was ‘to explore whether rulemaking would be helpful in providing guidance as to how covered entities could meet their pre-existing obligations to make their websites accessible.’”).

53. Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov’t Entities and Pub. Accommodations, 75 Fed. Reg. at 43,460.

54. *Id.* at 43,465.

55. *Id.* at 43,461.

56. *Id.* at 43,466.

57. *Id.* at 43,462.

Although the Department has been clear that the ADA applies to Web sites of private entities that meet the definition of “public accommodations,” inconsistent court decisions, differing standards for determining Web accessibility, and repeated calls for Department action indicate remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by title III. For these reasons, the Department is

recognized the need for public input in adopting “a clear requirement that provides the disability community consistent access to Web sites and covered entities clear guidance on what is required under the ADA.”<sup>58</sup>

*i. Web Content Accessibility Guidelines 2.0*

WCAG is a voluntary, technical standard developed by a non-governmental, private standards-setting company, the World Wide Web Consortium (W3C).<sup>59</sup> The guidelines require web developers to properly design websites to ensure that individuals with disabilities are able to use assistive technologies, like screen readers, to read the webpages’ content.<sup>60</sup> WCAG has three conformance levels—A, AA, AAA—and twelve guidelines, which are organized into four principles.<sup>61</sup> Conformance Level AA is considered the intermediate standard.<sup>62</sup> It is also the preferred standard as it has been cited in the DOJ’s settlement agreements and consent decrees with public accommodations.<sup>63</sup>

In addition, the standard has several layers of guidance, including overall principles, general guidelines, testable success criteria, and a rich collection of

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exploring what regulatory guidance it can propose to make clear to entities covered by the ADA their obligations to make their Web sites accessible.

*Id.* at 43,464; Shah, *supra* note 52, at 236 (“Specifically, the DOJ stated that the rationale for the ANPRM was “to explore whether rulemaking would be helpful in providing guidance as to how covered entities could meet their pre-existing obligations to make their websites accessible.”).

58. Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov’t Entities and Pub. Accommodations, 75 Fed. Reg. at 43,464.

For years, businesses and individuals with disabilities alike have urged the Department to provide guidance on the accessibility of Web sites of entities covered by the ADA. While some actions have been brought regarding access to Web sites under the ADA that have resulted in courts finding liability or in the parties agreeing to a settlement to make the subject Web sites accessible, a clear requirement that provides the disability community consistent access to Web sites and covered entities clear guidance on what is required under the ADA does not exist.

*Id.*

59. World Wide Web Consortium, *Web Content Accessibility Guidelines (WCAG) 2.0*, <http://www.w3.org/TR/WCAG20/> (last visited Mar. 19, 2018) [hereinafter *WCAG 2.0*] (the standard addresses a wide range of accessibility barriers for people with disabilities, “including blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity and combinations of these”).

60. *Id.*

61. *Id.*

62. *Id.*

63. See, e.g., Settlement Agreement Between the United States of America and Ahold U.S.A., Inc. and Peapod, LLC, DJ No. 202-63-169 at 5 (Nov. 17, 2014), [https://www.ada.gov/peapod\\_sa.htm](https://www.ada.gov/peapod_sa.htm); Settlement Agreement Between the United States of America and the National Museum of Crime and Punishment (Jan. 13, 2015), [https://www.ada.gov/crime\\_punishment\\_museum/crime\\_punishment\\_sa.htm](https://www.ada.gov/crime_punishment_museum/crime_punishment_sa.htm).

sufficient techniques, advisory techniques, and documented common failures to provide guidance on how to make web content accessible.<sup>64</sup>

*b. 2016 Supplemental Advance Notice of Proposed Rulemaking*

Since the 2010 ANPRM, the DOJ has done little to provide clarity concerning website requirements. In 2014, it submitted a Joint Notice of Proposed Rulemaking for Titles II and III of the ADA on website accessibility, which it retracted two years later on April 28, 2016, as it simultaneously issued a Supplemental Advance Notice of Proposed Rulemaking (2016 SANPRM) under Title II.<sup>65</sup> As explanation for the 2016 SANPRM, the DOJ concluded that “adopting Web accessibility standards would provide clarity to public entities regarding how to make accessible the services, programs, and activities they offer the public via their Web sites.”<sup>66</sup> Public commenters had the opportunity to comment on 123 questions on an even broader list than the 2010 ANPRM.<sup>67</sup> In addition, the DOJ noted its interest in considering WCAG 2.0 AA as the standard of compliance for covered entities.<sup>68</sup>

*c. The DOJ's Current Policy: Regulation May Be Needed*

On December 26, 2017, the DOJ published its notice of withdrawal of the 2010 ANPRM and 2016 SANPRM.<sup>69</sup> This decision by the agency negates seven years of public comments and agency efforts to establish an accessibility standard. Although the decision will not have any impact on ADA demand letters, it may change courts’ holdings on certain previously acceptable alternatives to web access, such as the 24/7 phone hotline mentioned in the 2010 ANPRM.

The DOJ reiterated its position in a response letter to U.S. House of Representative Ted Budd. In the letter, the DOJ cited its statement in its notice

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64. California Community College, *Distance Education Accessibility Guidelines for Students with Disabilities* (2011), [http://www.dspssolutions.org/sites/default/files/resources/2011\\_Distance\\_Education\\_Accessibility\\_Guidelines.FINAL\\_acc\\_.pdf](http://www.dspssolutions.org/sites/default/files/resources/2011_Distance_Education_Accessibility_Guidelines.FINAL_acc_.pdf).

65. See Supplemental Advance Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov’t Entities and Pub. Accommodations, 81 Fed. Reg. 49,908, 49,908 (May 9, 2016).

66. *Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov’t Entities*, DEPT. OF JUSTICE (April 29, 2016), <https://www.ada.gov/regs2016/sanprm.html> (Proposed rule RIN 1190-AA65 has been withdrawn) [hereinafter *Nondiscrimination*].

67. Supplemental Advance Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov’t Entities and Pub. Accommodation, 81 Fed. Reg. 49,908 (May 9, 2016); see also *Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov’t Entities and Pub. Accommodations*, 75 Fed. Reg. 43,460, 43,464–67 (July 26, 2010).

68. *Nondiscrimination*, *supra* note 66.

69. *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. at 60932 (Dec. 26, 2018).

of withdrawal: that the DOJ continues to evaluate whether website accessibility regulations are “necessary and appropriate,” particularly in consideration of its “entire regulatory landscape and associated agenda.”<sup>70</sup>

### 3. *The Circuit Split: District Courts’ Interpretation of the ADA and Websites*

#### a. *Gil v. Winn-Dixie*

The ADA website accessibility controversy has divided circuit courts for years. The split began with cases addressing the applicability of the ADA to websites and is now beginning to focus on deference to the DOJ’s public statements and enforcement activities, and legally binding standards governing private entities.<sup>71</sup> Thus, judicially-made law interpreting the ADA website accessibility requirements is fairly new. To highlight the split among the circuits, three cases adequately address the growing disension.

In a decision currently on appeal from the United States District Court for the Southern District of Florida, *Gil v. Winn-Dixie*,<sup>72</sup> the district court found that Winn-Dixie violated Title III of the ADA by failing to provide an accessible website. The court further found that companies are responsible for the entire website, including webpages operated by third party vendors.<sup>73</sup> Although the court’s analysis was narrowly framed to determine whether the visually-impaired plaintiff suffered harm as a result of Winn-Dixie’s failure to provide “full and equal enjoyment of the goods [and] services,” the relief outlined in the draft injunction was extensive for the harm alleged.<sup>74</sup> The draft injunction ordered the company’s website to meet the success criteria of WCAG 2.0—a standard that includes provisions addressing accessibility barriers to individuals with “blindness and low-vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities [and] photosensitivity.”<sup>75</sup> Yet the court acknowledged, as it quoted the relevant provision of the statute, that “an individualized inquiry must be made to determine whether [a] specific modification for [a] particular person’s disability would be reasonable under the circumstances as well as necessary for that person.”<sup>76</sup> Moreover, despite the testimony of Winn-Dixie’s corporate representative, who stated that website modification was feasible,<sup>77</sup> application of this standard clearly surpassed the specific modifications necessary for the visually impaired plaintiff. In addition, the draft injunction required the

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70. Letter from Stephen E. Boyd, Assistant Attorney General of the United States to Ted Budd, U.S. House of Representatives (September 25, 2018) (on file with author).

71. See *infra* section II.

72. 257 F. Supp. 3d 1340, 1348-9 (S.D. Fla. 2017).

73. *Id.* at 1347.

74. *Id.* at 1348, 1350–51.

75. *Id.* at 1351. See also *WCAG 2.0*, *supra* note 59.

76. *Gil*, 257 F. Supp. 3d at 1342.

77. *Id.* at 1345.

company to adopt an accessibility policy, provide website accessibility training, conduct ongoing compliance audits, and pay the plaintiff's reasonable attorney's fees and costs.<sup>78</sup>

This case is a clear departure from the United States District Court for the Central District of California's ruling in *Domino's*, which will be discussed further in Part II of this Note. Although neither case is binding on any other court, including other district courts, the courts' rulings serves as persuasive authority.<sup>79</sup> Likewise, the rulings—whether rightfully or wrongfully decided—serve as guidance to companies and individuals with disabilities on appropriate policies and procedures governing an area that requires specialized expertise that courts do not possess.<sup>80</sup> On the one hand, courts have a duty to provide speedy trial, and discretionary use of the primary jurisdiction doctrine can inevitably prolong the judicial process.<sup>81</sup> Nonetheless, courts weighing in on policy decisions and specialized areas—to which regulatory agencies are charged with handling—is a slippery slope. Consequently, this case is a continuation of an egregious cycle, perpetuated by the absence of regulations, which adds inconsistency to the law among the circuits. Following this model undermines the dual interest of Congress to provide adequate protections to individuals with disabilities and ensure covered entities have clear guidance on how to comply with the law.

*b. Gorecki v. Hobby Lobby*

*Gorecki v. Hobby Lobby*,<sup>82</sup> a case decided in the U.S. District Court for the Central District of California, further illustrates the consequences of this unorthodox phenomenon of imposing liability on companies without a legal standard. In *Gorecki*, the court denied Hobby Lobby's motion to dismiss a website accessibility lawsuit on the same grounds for which the court in the *Domino's* decision granted the motion to dismiss.<sup>83</sup> In its interpretation of the legislative history, the court stated that although the internet was in its infancy when Congress enacted the ADA, the legislature "intended that the ADA address not only physical barriers, but also communication barriers."<sup>84</sup> Hobby Lobby asserted a due process claim, but the court took an opposing view and seemingly overlooked the rationale of a case decided in the same circuit under similar

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78. *Id.* at 1350–51.

79. *Which Court is Binding?*, WRITING CTR. AT GEO. L. CTR. (2004), [http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/WHICH\\_COURT\\_IS\\_BINDING\\_Painter-and-Mayer-FINAL.pdf](http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/WHICH_COURT_IS_BINDING_Painter-and-Mayer-FINAL.pdf).

80. See Minh Vu & Julia Sarnoff, *Public Accommodations are Starting to Win Website Accessibility Lawsuits*, ADA TITLE III BLOG (Mar. 24, 2017), <https://www.adatitleiii.com/2017/03/public-accommodations-are-starting-to-win-website-accessibility-lawsuits/>.

81. See, e.g., *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008).

82. No. CV 17-1131-JFW(SKX), 2017 WL 2957736 1, (C.D. Cal. June 15, 2017).

83. *Id.* at 7.

84. *Id.* at 4.

circumstances.<sup>85</sup> The court reasoned that DOJ's unwavering position that the ADA applies to websites served as adequate notice.<sup>86</sup> In reaching this conclusion, the court found that the DOJ's failure to adopt a specific standard neither substantiates a due process claim nor excuses a company's failure to comply with the ADA.<sup>87</sup> Thus, the court determined that "the DOJ's general website accessibility requirement is not ambiguous because the DOJ has not imposed any specific means by which entities must meet this requirement and facilities such as Hobby Lobby are free to decide how to comply with the ADA."<sup>88</sup>

## II. *ROBLES V. DOMINO'S PIZZA, LLC* ADDS TO THE CIRCUIT SPLIT: AN EMERGING VIEW CENTERED ON DUE PROCESS PRINCIPLES AND FAIRNESS

In March 2017, the Central District of California issued an opinion in *Domino's* that further illustrates the evolving controversy regarding ADA website accessibility claims.<sup>89</sup> At issue was "whether and to what extent the ADA regulates web accessibility."<sup>90</sup> The court's decision, although currently on appeal, took a novel approach to addressing the ADA website accessibility disputes and held that: (1) imposing a specific accessibility standard, such as WCAG, would violate fundamental principles of fairness and due process, and (2) the DOJ's litigation posture and previously issued 2010 ANPRM is unpersuasive authority that does not warrant deference.<sup>91</sup> In doing so, the court dismissed the notion that WCAG is a legally binding standard in the absence of regulations explicitly addressing website accessibility and meaningful guidance by the DOJ.<sup>92</sup> While the Central District of California's decision is a substantial step in the right direction in the absence of regulations, as the court acknowledged, legislative and regulatory reforms are necessary to establish website accessibility requirements for public accommodations and ensure that individuals with disabilities have equal access to online goods and services.<sup>93</sup>

### A. *Facts*

In 2016, Guillermo Robles, a legally blind individual who uses screen reading software to read web content, attempted to order a customized pizza on

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85. *Id.* at 4, 7.

86. *Id.* at 5.

87. *Id.* at 6.

88. *Id.*

89. *Robles v. Domino's Pizza LLC*, No. CV1606599SJOSPX, 2017 WL 1330216, at \*1 (C.D. Cal. Mar. 20, 2017).

90. *Id.* at \*2.

91. *Id.* at \*5–6.

92. *Id.* at \*6.

93. *Id.* at \*8.

Dominos.com.<sup>94</sup> Robles alleged that he struggled to navigate the business' website several times, and in each instance was denied equal access to the goods and services available because of accessibility barriers that inhibited choosing, adding, or removing pizza toppings and checking out.<sup>95</sup> Robles subsequently initiated a class action lawsuit against Domino's under the ADA and California's Unruh Civil Rights Act, seeking injunctive relief and alleging that Domino's (1) pizzerias are public accommodations and that websites are a "service, privilege, or advantage of Domino's pizzeria[;]"<sup>96</sup> (2) failed "to design, construct, maintain, and operate its website [and mobile application] to be fully accessible to and independently usable by Plaintiff and other blind or visually-impaired people[;]"<sup>97</sup> and (3) should be required to comply with WCAG.<sup>98</sup> Specifically, the plaintiff complained that the company failed to make its website accessible to blind and vision-impaired customers using screen reader software, to ensure that its mobile app was compatible with voice over software, and to ensure that its website and mobile application complied with WCAG 2.0 AA.<sup>99</sup>

In response, Domino's sought a motion for summary judgment or, in the alternative, a motion to dismiss or stay the case.<sup>100</sup> In doing so, Domino's urged the court to find that neither its website nor its mobile application constituted a

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94. Complaint at 2, *Robles v. Domino's Pizza LLC*, 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017) (No. CV1606599SJOSPX).

95. *Id.* at 4.

96. *Id.* at 14.

97. *Id.* at 2.

98. *Id.* at 12. In addition, the plaintiff alleged that:

Under Section 302(b)(1) of Title III of the ADA, it is unlawful discrimination to deny individuals with disabilities the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

Under Section 302(b)(1) of Title III of the ADA, it is unlawful discrimination to deny individuals with disabilities an opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodation, which is equal to the opportunities afforded to other individuals. Under Section 302(b)(2) of Title III of the ADA, unlawful discrimination also includes, among other things:

"[A] failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations; and a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden."

*Id.* at 14 (internal citations omitted).

99. *Robles v. Domino's Pizza LLC*, No. CV1606599SJOSPX, 2017 WL 1330216, at \*1 (C.D. Cal. Mar. 20, 2017).

100. *Id.*



“place of public accommodation” within the meaning of the statute<sup>101</sup> and that the lawsuit

violate[d] fundamental principles of due process because the ADA, its implementing regulations, and the DOJ’s accessibility guidelines not only are silent with respect to the standard that apply to . . . websites, but also fail to indicate whether compliance with WCAG . . . is tantamount to compliance with the statute.<sup>102</sup>

In other words, the defendant grounded its argument on principles of fairness and due process.

### *B. Holding and Rationale*

The district court granted Domino’s motion to stay, reasoning that “regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III.”<sup>103</sup> In its holding, the court offered three essential points that merit highlighting.

#### *1. The DOJ’s informal statements in settlement agreements, consent decrees, and statements of interest do not warrant deference.*

The court rejected Robles’s claim that Domino’s must comply with WCAG because it had been cited by the DOJ in its settlement agreements and public statements.<sup>104</sup> Instead, the court held that proposed regulations that have not yet been adopted and the DOJ’s statements of interest filed in the course of litigation are owed little, if any, deference.<sup>105</sup> Moreover, the court reasoned that even if it gave deference to the DOJ’s statements of interest, consent decrees, and settlement agreements, Robles’s claim did not “hold water.”<sup>106</sup> In particular, the court noted that the cases on which the plaintiff founded his arguments were materially different and further establish “the vagueness concern that forms the basis of Defendant’s Motion, and demonstrate why a lack of formal guidance in this complex regulatory arena places those subject to Title III in the precarious position of having to speculate which accessibility criteria their websites and mobile applications must meet.”<sup>107</sup>

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101. *Id.* at \*2.

102. *Id.*

103. *Id.* at \*8.

104. *Cf.* Letter from Stephen E. Boyd, Assistant Attorney General of the United States to Ted Budd, U.S. House of Representatives (September 25, 2018) (on file with author) (DOJ conceded this point—that private businesses are not required to comply with WCAG 2.0—in its letter to Representative Ted Budd. In the letter, DOJ states that “noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA”).

105. *Id.* at \*4.

106. *Id.* at \*6.

107. *Id.* at \*7.

2. *Requiring covered entities to comply with WCAG “flies in the face of due process.”*<sup>108</sup>

Although the court rejected the argument that the suit should be dismissed because “the ADA was simply not drafted with the specific regulation of virtual spaces in mind,” it found merit in the due process argument.<sup>109</sup> The Court analogized the case to *United States v. AMC Entertainment, Inc.*, a Ninth Circuit Court of Appeals decision in which the court found that the regulation was vague or ambiguous and prevented “[the courts], armed with exceptional legal training in parsing statutory language, a ‘reasonable opportunity to know what is prohibited’—let alone those of ‘ordinary intelligence.’”<sup>110</sup> Similar to *AMC*, the Central District of California held that the DOJ has engaged in a “similarly lengthy timeline of . . . inaction” that requires “in-house counsel [and] others to read correctly legislative tea-leaves.”<sup>111</sup> Accordingly, the court ruled that imposing WCAG guidelines on all covered entities without identifying a conformance level defies fundamental principles of fairness and due process.<sup>112</sup>

3. *Congress and the DOJ need to amend the ADA.*

Given the complexity of website accessibility, the court determined that promulgation of regulations adopting an accessibility standard is necessary before the courts weigh in on the legal standard.<sup>113</sup> On this view, the court made a direct plea to Congress, the Attorney General, and the Department of Justice to “take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary.”<sup>114</sup>

### III. THE IMPACT OF THE DOJ’S FAILURE TO PROMULGATE REGULATIONS AND WHY THE *DOMINO*’S DECISION IS CORRECT

#### A. *The DOJ’s (In)Action and the Impacts*

The propensity to litigate to establish accessibility standards has led to a split among and within circuits and marks a growing trend of advocates pursuing ADA reforms through the judiciary rather than through legislatures or executive offices.<sup>115</sup> More importantly, the suits spin a familiar narrative that sheds light

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108. *Id.* at \*5.

109. *Id.* at \*3 n.1.

110. *Id.* at \*5 (quoting *United States v. AMC Entm’t, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008)). Moreover, the AMC court expressed frustration with the DOJ’s lengthy timeline to promulgate regulations clarifying covered entities’ legal obligations, which continued for over four years. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at \*5.

114. *Id.* at \*8.

115. *Compare, e.g., Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) (citing the 7th Circuit’s interpretation that a nexus between a physical location and a company’s website is not a prerequisite to determining whether the company is a public accommodation), *with Nat’l*

on the lack of necessary proactivity by Congress and the DOJ. This is grossly ineffective and has created considerable challenges for individuals with disabilities and businesses.

First, it abandons the traditional legislative and regulatory regime, which provides the public with the opportunity to comment and the covered entities with advance notice of their legal obligations, as well as time to comply with those obligations.<sup>116</sup> In essence, failure to establish clear and comprehensive requirements through rulemaking, as Congress intended, has left private entities unclear on how to comply with the ADA and hesitant to adopt WCAG guidelines, which can be amended or changed at any time by the private standards-setting company that develops the standards. As collateral damage, this skepticism has impeded equal access on the internet, thereby depriving individuals with disabilities of independent living to shop, communicate, and manage their finances, and placed businesses and consumers at odds.

Starting in 2014, covered entities began receiving demand letters, alleging ADA violations for failure to provide an accessible website in compliance with WCAG and threatening lawsuits if the companies refused to enter into settlement agreements.<sup>117</sup> This assertion, however, is troubling in the absence of a legal standard, particularly because companies could be making good-faith efforts to provide an accessible website using WCAG or other accepted accessibility standards. This is a concern that was recognized previously by the DOJ in its 2010 ANPRM as it sought comments on “how to address the ongoing changes to WCAG” and considered whether it should adopt “performance standards instead of any set of specific technical standards.”<sup>118</sup>

In many cases, the demand letters have resulted in lawsuits, which has led to a surge in ADA website accessibility lawsuits over the past few years. In 2015, there were at least 57 federal website accessibility lawsuits.<sup>119</sup> In just two years, the number of lawsuits increased to 432, and states such as New York and Florida have become a hot bed for ADA litigation.<sup>120</sup> But, pursuant to the court’s holding in *Domino’s*, plaintiffs are not using legally binding authority to advance ADA website accessibility claims, as the DOJ’s enforcement actions and

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Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006) (providing that the 9th Circuit’s interpretation differs from the 7th Circuit’s interpretation because the 9th Circuit reads the definition of public accommodation to require a nexus between a store’s physical location and website).

116. 5 U.S.C. §§ 552(a)(1), 553 (2012).

117. Duane Morris, *ADA Website Cases Filed in Federal Court in Pittsburgh, with More Likely to Follow* (Aug. 24, 2015), [https://www.duanemorris.com/alerts/ada\\_website\\_cases\\_filed\\_federal\\_court\\_pittsburgh\\_more\\_likely\\_to\\_follow\\_0815.html](https://www.duanemorris.com/alerts/ada_website_cases_filed_federal_court_pittsburgh_more_likely_to_follow_0815.html).

118. Nondiscrimination on the Basis of Disability; Accessibility of Web Info. and Servs. of State and Local Gov’t. Entities and Pub. Accommodations, 75 Fed. Reg. 43,460, 43,465 (July 26, 2010).

119. Launey & Aristizabal, *supra* note 21.

120. *Id.*

litigation posture have become the crux of plaintiffs' arguments.<sup>121</sup> Specifically, many plaintiffs argue that a company's failure to comply with WCAG 2.0 AA renders its website inaccessible, in violation of the ADA.<sup>122</sup>

Still, in the absence of clear statutory and regulatory language concerning website accessibility, courts are inevitably creating inappropriate reforms in the law through *ad hoc* decisions.<sup>123</sup> Rightfully, the vastly different applications of the law refuse to give the DOJ's informal guidance or litigation posture deference as neither carry the force of law.<sup>124</sup> At the same time, these decisions incorrectly dismiss the obvious constraints of the statutory and legislative history that Title III only applies to physical public accommodations. Thus, courts have failed to devise a uniform test for analyzing ADA's application to websites.

*B. The Domino's Decision Correctly Holds WCAG Does Not Have the Force of Law*

The *Domino's* decision dispels the continuous source of confusion stemming from the DOJ's enforcement activities over the years that WCAG has the force of law and provides the best resolution of the pressing issues concerning website accessibility until Congress amends the law or the DOJ adopts a specific accessibility standard through rulemaking. Legislative rules, deriving from rulemaking and adjudication procedures, are legally binding on the public. However, as *Domino's* acknowledged, the DOJ has engaged in neither formal adjudication nor rulemaking. Instead, it has attempted to circumvent rulemaking procedures, which provide the public with notice and a meaningful opportunity to comment, by submitting statements of interest in federal court cases and, in effect, forcing companies to comply with WCAG in settlement agreements and consent decrees. Courts ordinarily apply deference principles where the agency charged with writing rules has interpreted the statute through regulation.<sup>125</sup> However, the DOJ is not entitled to deference, according to the court, as it has failed to promulgate final regulations.

This approach recognizes the need for ADA legislative and regulatory reforms necessary to establish a comprehensively applicable definition of accessibility, and properly invokes the primary jurisdiction doctrine to compel Congress and the DOJ to weigh in on the specific accessibility standard needed for companies to comply with the ADA.<sup>126</sup> In doing so, it recognizes that without clear statutes

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121. See Bill Boeck, *The Scourge of Website ADA Claims*, LOCKTON COMPANIES (May 2016), [http://www.lockton.com/whitepapers/Boeck-Website\\_ADA\\_Claims-May16.pdf](http://www.lockton.com/whitepapers/Boeck-Website_ADA_Claims-May16.pdf).

122. *Id.*

123. See Vu et al., *ADA Title III Lawsuits Increase by 37 Percent in 2016*, ADA TITLE III BLOG (Jan. 23, 2017), <https://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016/>.

124. H.R. REP. NO. 101-485 at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391.

125. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

126. See *Robles v. Domino's Pizza LLC*, No. CV1606599SJSPX, 2017 WL 1330216, at \*6-8 (C.D. Cal. Mar. 20, 2017).

or regulations, courts are ill-equipped to enforce any type of standard upon businesses as website accessibility is an area that requires technical expertise that exceeds that of the courts.<sup>127</sup>

*C. Congress and the DOJ Must and Should Act to Establish Clear Website Accessibility Requirements*

The current regulatory regime emphasizes the need for Congress to amend the ADA to ensure uniformity in regulation and application of the law. In the absence of ADA amendments by Congress, the DOJ must amend its regulation to provide notice to the public and courts on the legal requirements of companies with websites and ensure that individuals with disabilities have equal opportunities on the Internet. Without these amendments, the ADA is an outdated law that fails to defend individuals with disabilities from discrimination in all aspects of life. Furthermore, the federal government cannot meet its own statutory mandate to ensure that individuals with disabilities have equal access without clear regulations.<sup>128</sup>

#### IV. CONCLUSION

Website accessibility is undoubtedly necessary to ensure that individuals with disabilities have access to electronic commerce. However, until Congress amends the statute and the DOJ writes regulations, it is not legally required. More importantly, even if courts find that the ADA as currently written applies to websites, the regulations do not prescribe how to comply with the law. The *Domino's* decision recognizes this shortcoming of the law and the need for courts to urge policymakers to properly address the issue.

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127. *Id.* at \*8.

128. *Abrar & Dingle*, *supra* note 6, at 134.